UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRETT MORRISON,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Docket No. 00-51-P-H***
	)	
SUPERINTENDENT, MAINE CORRECTIONAL CENTER,[1]	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR BAIL

The petitioner, appearing *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with the sentence imposed by the Maine Superior Court (Cumberland County) after a jury convicted him on charges of theft by deception and forgery in violation of 17-A M.R.S.A. §§ 354, 362 and 703 and release on bail pending a hearing on, and resolution of, his petition. I recommend that the court deny both the petition and the bail motion without a hearing.[2]

---

[1] In a letter to the clerk of this court dated April 21, 2000 the petitioner reported that he has been moved from the Maine Correctional Center to the Bolduc Correctional Facility. If the petitioner were entitled to relief, it would be necessary to change the caption of this action to reflect the fact that such relief would be ordered against the superintendent of the facility in which he is housed. However, under the circumstances, for the sake of consistency, I have left the caption as it was at the time the petitioner began this action.

[2] In his letter dated April 21, 2000 and in a letter addressed to the clerk of this court dated March 28, 2000 the petitioner alleges that his access to the courts through access to the law library at the Maine Correctional Center was wrongfully limited or denied. However, neither letter in any (continued...)

I. Background

The following excerpts from the opinion of the Maine Law Court denying the petitioner's direct appeal from his conviction are relevant to some of the claims raised by the petitioner in this proceeding.

> Defendant Brett Morrison appeals from judgments entered in the Superior Court (Cumberland County . . .) on a jury verdict convicting him of theft by deception (17-A M.R.S.A. § 354(1) & 362(2)(A) (1983)) and forgery (17-A M.R.S.A. § 703(1)(A) & 2(A) (1983 & Supp. 1997)). On appeal, defendant argues that the court . . . abused its discretion when it denied his pretrial request for court-appointed counsel and when it found that he had waived his right to counsel. . . . Finding no error, we affirm the judgments.
>
> Defendant was indicted for theft by deception and forgery, and filed a motion for appointment of counsel, accompanied by a financial affidavit. In his affidavit, he claimed an approximate annual income of $40,000 and personal property valued in excess of $15,000. The court denied his motion and continued his arraignment for four days to permit him to retain counsel. Defendant was arraigned as scheduled and retained counsel for arraignment only. The court on subsequent occasions continued the case for trial in order to permit him to retain counsel. Despite his earlier representations to the court, defendant was still without counsel on the day of trial. The court fully advised him of his right to counsel prior to trial and on the day of trial. Although defendant described his unsuccessful efforts to hire a number of counsel who demanded large retainers, even when asked, he did not suggest that his financial affidavit was in error. The court explicitly found that his actions and statements demonstrated a waiver of his right to counsel. After a trial in which he represented himself, defendant was convicted on both counts. Prior to sentencing, defendant again requested the appointment of counsel and for the first time, revealed in a corrected financial affidavit that he had no annual income. The court appointed counsel for defendant and thereafter sentenced him.

State v. Morrison, 723 A.2d 869, 869-70 (Me. 1998).

---

[2](...continued)
way suggests that his ability to address adequately the claims he raised in this proceeding, through a petition dated February 28, 2000, was interfered with by these actions.

A few weeks after the Law Court issued its decision, the petitioner filed a *pro se* motion for new trial in the Superior Court based on allegedly newly discovered evidence and invoking M.R.Crim.P. 33. Defendant's Motion for a New Trial, *State of Maine v. Brett Morrison*, Docket No. CR-96-525, Maine Superior Court (Cumberland County), copy filed with docket sheet. This motion again asserted that the petitioner had been denied appointed counsel and added claims that he had not been presented with a witness list by the prosecution as had been ordered by the court before trial and that the prosecutor had made false statements to the trial judge concerning the petitioner's request that the trial judge recuse himself. *Id*. at 1-3. After hearing oral argument on this motion, the trial judge denied it. *State of Maine v. Brett Morrison*, Docket No. CR-96-525, Maine Superior Court (Cumberland County), Docket at 6 (reverse). The Law Court denied the petitioner's appeal from this decision, holding in an unpublished opinion as follows:

> Defendant, Brett Morrison, appeals from a judgment of the Superior Court (Cumberland County . . .) denying his motion for a new trial based on "newly discovered evidence" pursuant to M.R.Crim.P. 33. Contrary to the defendant's contentions, the trial court did not commit clear error in determining that the defendant did not present "newly discovered evidence," as the impeachment evidence presented was obtainable prior to the trial and defendant did not demonstrate that the evidence would have changed the outcome of the trial. *See State v. Ardolino*, 1999 ME 14, ¶¶ 8-9, 723 A.2d 870, 873. Furthermore, the witness list presented by the defendant is not "evidence." Lastly, defendant's complaint regarding the denial of counsel was previously resolved in *State v. Morrison*, 1998 ME 220, ¶ 4, 723 A.2d 869, 870.

State v. Morrison, Dec. No. Mem 99-120, Docket No. Cum-99-35, Maine Supreme Judicial Court (Oct. 19, 1999), slip op. at 1.

The petition for habeas corpus relief was filed in this court on February 29, 2000.

II. Discussion

A. Procedural Default

The state first argues that all four of the petitioner's claims are procedurally defaulted and that he is therefore not entitled to relief. "[F]ederal habeas review is precluded, as a general proposition, when a state court has reached its decision on the basis on an adequate and independent state-law ground." *Burks v. Dubois*, 55 F.3d 712, 716 (1st Cir. 1995).

> Under that doctrine, federal courts sitting to hear habeas petitions from state prisoners are barred from reviewing federal questions which the state court declined to hear because the prisoner failed to meet a state procedural requirement. In such cases, the state judgment is said to rest on independent and adequate state procedural grounds. Considerations of comity and federalism bar the federal court's review. . . . Without the "independent and adequate state ground" doctrine, federal courts would be able to review claims the state courts never had a proper chance to consider.

Brewer v. Marshall, 119 F.3d 993, 999 (1st Cir. 1997) (citations omitted).

The first ground for relief asserted in the petition is that the trial court abused its discretion[3] and violated the petitioner's constitutional right to due process of law by denying his request for appointment of counsel at the state's expense. Petition Under 28 U.S.C.A. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 2) at 4. The state contends that the Law Court's rejection of this claim in the petitioner's second appeal because it had been resolved on the petitioner's first appeal constitutes an independent and adequate state ground barring

[3] To the extent that this or any other ground for relief in the petition is assertedly based on an abuse of discretion by the state trial court, no basis for relief under section 2254 is thereby presented. "[T]he remedy is limited to the consideration of federal constitutional claims." *Burks*, 55 F.3d at 715. An abuse of discretion by a state trial court, standing alone, does not rise to the level of a federal constitutional violation. *Purnell v. Missouri Dep't of Corrections*, 753 F.2d 703, 707 (8th Cir. 1985) (arguing abuse of discretion asserts no constitutional ground); *see Brown v. Powell*, 975 F.2d 1, 5 (1st Cir. 1992) (issue whether trial court abused discretion and thereby committed constitutional error). Such claims in the instant petition will not be considered further.

this court from considering the issue. Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, etc. ("State's Response") (Docket No. 6), at 11-12. To the contrary, the purposes of the "independent and adequate state ground" doctrine would not be served at all by preventing a state prisoner from raising in a federal habeas action an issue that was fully considered on the merits by the state's highest court, merely because he mistakenly sought to raise it again in a *pro se* motion for a new trial. There was no procedural default present in the state court on the petition's first claim under the circumstances of this case.

With respect to the remaining three claims in the petition, the state asserts a procedural fault because they could have been raised in the petitioner's direct appeal from his conviction but were not, citing *State v. Thomes*, 697 A.2d 1262, 1266 (Me. 1997). Those claims are that the petitioner was deprived of due process of law by the trial judge's refusal to recuse himself, the failure of the state to provide the petitioner with its witness list before trial, and the state's allegedly illegal prosecution of the petitioner in order to "advocat[e]" for unidentified other persons to "pursue" the petitioner through an involuntary bankruptcy proceeding and eviction from unidentified property.[4] Petition at 4-5. While the state accurately cites *Thomes* for the proposition that an issue not pursued on appeal is waived, that is not the case here. Even if the state's point is correct, the doctrine of "adequate and independent state ground" only applies to bar a federal court's consideration of an issue in a habeas proceeding if the state court "has not waived [the applicable procedural

[4] It is only through an indulgent reading of the petitioner's motion for a new trial that the fourth issue he raises in this proceeding may be said to have been presented to the state courts. If I could not so conclude, this issue would not have been exhausted in the state courts, *Adelson v. DiPaola*, 131 F.3d 259, 262-63 (1st Cir. 1997) (exhaustion requirement), and a dismissal of the entire petition would be required, *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (petitions containing both exhausted and unexhausted claims must be dismissed).

requirement] in the particular case by resting its decision on some other ground." *Burks*, 55 F.3d at 716. Here, the Law Court cannot fairly be said to have rested its decision on the petitioner's appeal from the denial of his motion for a new trial on the procedural ground that the petitioner could have raised these issues in the direct appeal from his conviction but did not do so. No such ground is mentioned or alluded to in the unreported decision. Accordingly, the state has not demonstrated any procedural default as to these issues.

B. The Merits

1. Ground One.

The petitioner presents his claim concerning the trial court's denial of his request for court-appointed counsel as one implicating his constitutional right to due process of law, but it is more appropriately cast as invoking the Sixth Amendment right to counsel. In any event, in order to prevail on this ground, the petitioner must demonstrate that the Law Court's adjudication of his claim

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). If the petitioner relies on the latter alternative, a factual determination "made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Here, the petitioner appears to rely on the latter alternative, because he asserts: "Although Defendant had been placed in an Involuntary Bankruptcy-Chapter 7 on October 13th, 1995 and

indicted & arraigned while under bankruptcy, Defendant was not allowed to have an attorney appointed to represent him in a Felony B trial." Petition at 4. He also contends that "[w]hen Defendant's bankruptcy was 'dismissed without discharge', the presiding Judge in this criminal matter . . . told Defendant that he now wanted Defendant represented at sentencing and, on the same Indigency paperwork, appointed" counsel. *Id*. The record belies the petitioner's assertions. The financial affidavit filed by the defendant in connection with his motion for appointment of counsel does not mention the bankruptcy proceeding. State of Maine Indigency Affidavit, Docket No. 96-525, dated April 8, 1996, Item No. 2 in Index, *State v. Brett Morrison*, CR 96-525, Law Court #CUM96-786 ("Index"). An indigency affidavit dated February 27, 1997 appears in the record; this affidavit, unlike the earlier one, lists no income and mentions a bankruptcy proceeding. Item 40 in Index. In response, counsel was appointed, obviously on the basis of different "paperwork," before sentencing was held on October 3, 1997. Docket at 5 and 5(reverse). The petitioner has not shown the Law Court's factual determinations on this issue to be unreasonable nor has he overcome the presumption that they are correct.

If the petitioner is relying on the first alternative under section 2254(d), the Law Court's decision on this issue, given its factual determinations, cannot be said to have resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law. Indeed, from all that appears, the decision was fully in accord with clearly established federal law. *See Fareta v. California*, 422 U.S. 806, 835 (1975) (knowing and intelligent waiver of right to counsel); *Moir v. State*, 81 F.3d 169 (table), 1996 WL 138470 (9th Cir. Mar. 27, 1996), at *1 (test for indigency). The petitioner is not entitled to relief on this ground.

2. Ground Two.

The petitioner apparently sought recusal of the trial judge on the ground that he had previously been represented by an assistant attorney general other than the one who was prosecuting him and that that assistant attorney general was representing the state in actions against another "party which had involvement with this Defendant's case," apparently in that two individuals on the state's witness list, Thomas Blackburn and Gregory O'Halloran, "overlapped with the case [the other assistant attorney general] was involved with."[5] Petition at 4. Since neither of these individuals in fact testified at the petitioner's trial, the basis for the requested recusal is difficult to discern. Even if they had testified, there would be no basis for a finding that the trial judge should have recused himself.

If the petitioner means to argue that the trial judge gained information or formed an opinion based on the events involved in the state's case against the unidentified "[]other party," Petition at 4, his conclusory presentation fails to show, or even to allege, the extraordinary circumstances that would demonstrate "a deep-seated favoritism or antagonism that would make fair judgment impossible," *Johnson v. Amica Mut. Ins. Co.*, 733 A.2d 977, 980 (Me. 1999). If the petitioner means to argue that the trial judge's knowledge that an assistant attorney general who had represented him in two prior civil actions was now prosecuting a case in which some of the witnesses might also be (but ultimately were not) witnesses against the petitioner somehow necessarily resulted in the trial

[5] The petition also asserts that the prosecutor did not present a witness list until the day of the trial, in violation of an earlier court order, and falsely "promised that there was no connection between the two cases when Defendant asked [the trial judge] to recuse himself." Petition at 4. Since the only connection between the two cases demonstrated by the petition is that two witnesses in the other case were listed as witnesses against the petitioner, but never called to testify, the alleged falsehood has no apparent bearing on the question of the need for the trial judge to recuse himself. The lack of timely provision of the witness list suffers from a similar deficiency.

judge's bias against the petitioner, the mechanism by which any such bias might develop is unclear at best. Nothing in that statement of the petitioner's position even begins to approach the egregiousness required to support a conclusion that failure to grant the motion for recusal constituted a due process violation. *State v. Rameau*, 685 A.2d 761, 763 (Me. 1996). The petitioner's presentation on this issue cannot be construed to present even the possibility of a due-process violation. *See generally Liteky v. United States*, 510 U.S. 540, 556 (1994).

3. Ground Three.

The petitioner alleges, in conclusory fashion, that "[p]rosecutorial misconduct on the part of the Attorney General's Office . . . has been ongoing in this case." Petition at 4. He argues that his right to due process had been violated[6] by "malicious[]" actions of the state, but the only such action he identifies is the alleged failure of the prosecutor to provide him with a witness list before trial as ordered by a Superior Court judge other than the one who presided at his trial. *Id.* The petition states that the "tape" of the hearing at which the alleged order was entered "is now missing," but does not contend that the state intentionally lost it. *Id*. The petition alleges that the prosecutor "would later stipulate to 'misstatements' at hearing(s)," *id*. at 5, but does not identify any such statements or hearings. Again, the petition asserts that "other pertinent transcripts would end up lost or missing in-whole [sic] or in-part [sic] when requested by the Defendant," *id*., but does not specify which transcripts or how they would be relevant to the petitioner's claims; nor does the petition allege that the state intentionally deprived the petitioner of such transcripts. Indeed, if it is only the

[6] The petitioner alleges that his due process rights "under [the] Maine and Federal Constitutions" have been violated by the prosecutor. Petition at 4. Only federal statutory or constitutional rights are at issue in this proceeding. 28 U.S.C. § 2254(a).

transcripts that are missing, new transcripts could presumably be made from the original records.[7] In any event, with the exception of the reference to the witness list, the petition's allegations are vague and conclusory and insufficient to justify a hearing under section 2254. *David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998).

With respect to the witness list, the petitioner's discussion of Thomas Blackburn and Gregory O'Halloran is irrelevant, as neither actually testified against him. The petitioner's remaining argument states, in its entirety: "Access to the witness list would have divulged a *bipolar* chief witness (Thomas Couchon) and another chief witness (Angus Bruce) who was associated with the above-referenced Thomas Blackburn, Esq. and Gregory O'Halloran — who were also witnesses for the State in this case)." Petition at 4 (emphasis in original).[8] Couchon and Bruce are two of the six victims listed in the indictment, Indictment for Violation of Count I — Theft by Deception 17-A M.R.S.A. § 354 (1983) (Class B) and Count II — Forgery 17-A M.R.S.A. § 703 (1983) (Class B), *State of Maine v. Brett C. Morrison*, Docket No. 96-525, Maine Superior Court (Cumberland County), attached to Docket, so it can hardly have been a surprise to the petitioner that they were called to testify at his trial. He does not assert that he could only have determined that Couchon was "bipolar" after being formally notified that Couchon might be called as a witness; in the absence of

[7] The petition also alleges that the attorney appointed to represent the petitioner at sentencing "would . . . destroy, immediately, the entire trial transcript which had been provided by the State." Petition at 5. The petition provides no reason for the court to conclude that any such action should be deemed to have been undertaken by the state or otherwise to form part of a constitutional violation.

[8] The respondent's entire argument on the merits of the third and fourth grounds stated in the Petition reads: "Contrary to the Petitioner's assertions, as prosecutorial misconduct took place [sic]. Petitioner simply mischaracterizes the record facts. (*See again* Part I of this Response.)" State's Response at 18. This is of no help whatsoever to the court.

such an allegation, no potential for prejudice can be shown. In addition, the fact that Couchon suffered from a mental illness does not make his testimony inadmissible or so inherently unworthy of belief that it may be assumed that the outcome of the trial would have been different. *King v. Ponte*, 717 F.2d 635, 644 (1st Cir. 1983) (no habeas relief where timely disclosure of evidence, failure of state prosecutor to do so being the basis for the petition, would not have affected outcome of trial). The petitioner's claim concerning Bruce is unclear; apparently, the petitioner believes that he could have impeached Bruce's testimony with the fact that he was "associated" with individuals who were being sued for fraud and had been indicted on federal fraud charges. Petition at 4-5. The legal woes of a witness's "associates" are not generally admissible as impeachment evidence, and the petitioner suggests no reason why an exception would have been made in his case.

In any event, three of the victims listed in the indictment other than Couchon and Bruce testified at trial, Transcript, *State of Maine v. Brett C. Morrison*, Docket No. CR-96-525, Maine Superior Court (Cumberland County), Volumes I-III (hereafter "Tr. I-III") (index). The testimony of those individuals, without the testimony of Couchon and Bruce, was sufficient to allow the jury to convict the petitioner. Accordingly, he cannot demonstrate a constitutional violation arising from the state's alleged failure to inform him in advance that Couchon and Bruce might testify against him. *United States v. Prows*, 118 F.3d 686, 693 (10th Cir. 1997).

4. Ground Four.

Finally, the petitioner contends that the state prosecuted him illegally "by advocating for the filing of an illegal Involuntary Bankruptcy — Chapter 7 in U.S. Bankruptcy Court & other Maine District and Superior Courts." Petition at 5. A bankruptcy action cannot be filed in a Maine district or superior court. If the reference to Maine courts should properly be seen as a reference to

"evictions from property(ies) while Defendant was under U.S. Bankruptcy *automatic stays*," *id*. (emphasis in original), the claim omits any identification of the eviction actions, the courts in which they were brought, and the evidence to be offered by the petitioner of involvement in such private civil actions by the state. These allegations are vague and conclusory and cannot serve to justify a hearing on the petitioner's claim. *David*, 134 F.3d at 477. Similarly, the petition provides no factual basis for its assertion that unidentified individuals and "entities" were "apparent[ly] assur[ed]" that they would be "safe" "while helping out with the State's agenda against Defendant." Petition at 5.[9]

Finally, the "illegal involuntary bankruptcy" to which the petitioner refers, *id*., bearing a docket number of 95-20875 in the United States Bankruptcy Court for the District of Maine, Motion for Protection of Date, *State of Maine v. Brett Morrison*, Docket No. CR-96-525, Maine Superior Court (Cumberland County), Item 21 in Index, at 1, was filed on October 13, 1995, Docket, *In re Brett C. Morrison*, Bankruptcy Petition No. 95-20875, United States Bankruptcy Court, District of Maine, long before the indictment in the underlying criminal case was returned on March 11, 1996. Docket, *State of Maine v. Brett C. Morrison*, Docket No. CR96-525, Maine Superior Court (Cumberland County), at 1. Accordingly, the petitioner must be contending not that the state encouraged the filing of such an action but rather that the state "advocat[ed]" that the action be "pursue[d]" by the unidentified person or persons who did file the bankruptcy petition in order "to induce an appearance of fraud." Petition at 5. The petitioner cites no reference to this bankruptcy proceeding in the record of the evidence presented to the jury at his trial, and, in fact, the only

[9] Indeed, even if the petitioner's argument on this point could have been construed as sufficient to meet the specificity requirements of *David*, it is immediately undermined by the next sentence in the petition, which states that the petitioner "is now pursuing said individuals and entities in U.S. District Court" and identifies three cases, Petition at 5, none of which have named defendants whom the petitioner has shown to be involved in the underlying criminal case in any way.

evidence concerning the bankruptcy proceeding admitted at the trial was offered by the defendant himself. Tr. III at 401, 415-16. He cannot complain of an attempt to induce an appearance of fraud at his trial when he himself introduced the only evidence upon which such an appearance could be based. In the absence of any other suggestion of a way in which the prosecution was "illegal," the petitioner has presented no basis for relief on this claim.

C. Motion for Bail

The petitioner has also filed a motion entitled Motion for Bail/Release Pending Disposition of Petition under 28 U.S.C.A. 2254 for Writ of Habeas Corpus, etc. (Docket No. 4) and two requests for a hearing on that motion (Docket Nos. 5 & 8). If the court adopts my recommendation that the petition be dismissed without hearing, the motion for bail is moot. Even if the court were to disagree with my conclusions, however, the petitioner has not established that he is entitled to release on bail pending the disposition of his petition and there is no need for a hearing on that motion.

In the First Circuit, a petitioner must make an extraordinary showing in order to be released on bail while his petition for habeas corpus relief is pending. *Layne v. Gunter*, 559 F.2d 850, 851 n. 2 (1st Cir. 1977). Most important here is the fact that the petitioner has failed to establish the likelihood of success on the merits of his petition. *See Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972). The petitioner does not present any basis for the release that he seeks other than the asserted merit of his section 2254 claims, and there is nothing so extraordinary about the conclusory claims in his motion that release on any terms could be justified. "[I]n the absence of exceptional circumstances — whatever that may include — the court will not grant bail prior to the ultimate final decision unless petitioner presents not merely a clear case on the law . . . but a clear, and readily evident, case on the facts." *Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972). The petition in this

case fails to meet this standard.

III. Conclusion

For the foregoing reasons, I recommend that the petition be **DISMISSED** without an evidentiary hearing and that the motion for bail be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of May, 2000.

_____

David M. Cohen
United States Magistrate Judge

MORRISON v. MCC, SUPT Filed: 02/29/00 Assigned to: JUDGE D. BROCK HORNBYDemand: $0,000 Nature of Suit: 530Lead Docket: None Jurisdiction: Federal QuestionDkt# in other court: NoneCause: 28:2254 Petition for Writ of Habeas Corpus (State)BRETT MORRISON BRETT MORRISON plaintiff [COR LD NTC pse] [PRO SE] MAINE STATE PRISON BC7 BOX A THOMASTON, ME 04861 v. MCC, SUPT CHARLES K. LEADBETTER defendant 289-3661 [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6 AUGUSTA, ME 04333 626-8800